Supreme Court U.S.
FILED
MAR 25 2002
OFFICE OF THE CLERK

No. 01-1074

IN THE

# Supreme Court of the United States

GREGORY GILMORE,

*Petitioner,*

*v.*

GE REUTER-STOKES,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether Summary Judgment is appropriate under the facts of this case?

II. Whether Defendant's non-discriminatory reason for discharge of Plaintiff is a pretext?

III. Whether Plaintiff is required to request an accommodation? If so, was there such a request under the facts of this case?

IV. Whether Defendant retaliated against Plaintiff?

## STATEMENT PURSUANT TO RULE 29.6

Respondent, GE Reuter-Stokes is a wholly-owned subsidiary of General Electric Company.

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## STATEMENT OF THE CASE

Plaintiff Gregory Gilmore ("Gilmore") was employed as a Senior Engineer at GE Reuter-Stokes. ("Reuter-Stokes"). In August of 1995, he was assigned to the Environmental Products Team. In this position, which he held until his employment terminated in February of 1997, he reported directly to Karen Embrescia ("Embrescia"), Environmental Team Manager, and Chris Forland ("Forland"), CEMS Product Line Manager. (Forland transferred to another General Electric facility in November of 1996, and was replaced by Hesh Elghoroury ("Elghoroury"). At this point Gilmore reported indirectly to Elghoroury.

In April of 1996, Gilmore received his first written performance appraisal from Embrescia. Embrescia rated Gilmore's performance unsatisfactory and described his behavior as unacceptable, unbecoming as a professional and not consistent with company values. She wrote that his performance needed an immediate turnaround. Embrescia provided detailed feedback on areas in which he needed to improve including his interpersonal and communication skills. Gilmore was at that time placed on a Performance Improvement Plan ("PIP"). Embrescia's evaluation of Gilmore was based on her personal knowledge of his performance, as well as on input received from others including Forland and Glesius.

On February 11, 1997, Embrescia completed another written performance appraisal for Gilmore. Embrescia continued to rate his performance unsatisfactory, and noted his continued need to improve in the areas addressed in the April, 1996 evaluation. Embrescia again based her

assessment of Gilmore's performance on her personal knowledge as well as on input received from others including Forland, Glesius, and Elghoroury.

On February 19, 1997, P.J. Marolda ("Marolda"), President of Reuter-Stokes, received a memorandum from W.W. Phelan ("Phelan"), Vice-President of Marketing and Sales for Reuter-Stokes, which stated that ESSROC, a key Reuter-Stokes customer, had complained to him about Gilmore at a meeting between Phelan and ESSROC representative on February 18, 1997. ESSROC had strongly objected to the conduct, behavior and attitude of Gilmore and requested his removal as the field engineer representing Reuter-Stokes. Customer feedback which raised communication issues had been noted on Gilmore's April 1996 performance appraisal.

On February 22, 1997, Embrescia telephoned Gilmore and informed him that he was suspended with pay as a result of a serious customer complaint.

At this point in time, Marolda consulted with Embrescia, Glesius, Elghoroury, and Joseph Mooney ("Mooney"), Human Resources Manager, concerning this latest customer complaint, Gilmore's overall performance. Based on this review, Marolda decided to terminate Gilmore's employment. Embrescia and Mooney concurred with the decision.

Marolda and Embrescia notified Gilmore that he was terminated on February 25, 1997 for unsatisfactory performance and attitude.

Gilmore subsequently filed this action, alleging, inter alia, that he was discharged in violation of the Americans with Disabilities Act ("ADA").

The Defendant filed a Motion for Summary Judgment. The trial court (U.S. Dist. Ct. for the N.D. of Ohio, E.D.) granted Defendant's Motion for Summary Judgment. Plaintiff appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed the trial court's decision. Thus, Plaintiff petitioned this Court for a Writ of Certiorari.

## ARGUMENT

## REASON FOR DENYING THE WRIT

The facts and law of the case do not present any special or compelling reasons that would invoke the United States Supreme Court's discretionary jurisdiction over Writs of Certiorari. Plenary review in this case are inappropriate for the following reasons:

**First:** Summary Judgment is appropriate when no genuine issue of material fact exist and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (citing Fed. R. Civ. P. 56(c)); *see also LaPoint v. U.A.W., Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The burden of showing the absence of any such genuine issues of material fact rests with the moving party. *Celotex*, 477 U.S. at 323 (citing Fed. R. Civ. P. 56(c)) A fact is material only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmoving party. Federal Rule of Civil Procedure 56(e). The Court must afford all reasonable inference and construe the evidence in light most favorable to the nonmoving party. *Cox v. Kentucky Dept, of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995); *See also United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 562 (6th Cir. 1985).

However, the nonmoving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by the jury." *Cox*, 53 F.3d at 150.

Summary Judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of the case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex*, 477 U.S. at 322). Accordingly, "the mere existence of a scintilla of evidence in support of Plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the Plaintiff." *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (quoting *Anderson*, 477 U.S. at 52 (1986)). Moreover, if the evidence is "merely colorful" and not "significantly probative", the Court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249-50.

> Under the ADA, in the absence of direct evidence of discrimination, a Plaintiff may seek to establish a prima facie case of discrimination. Once established, a prima facie case shifts the burden to the employer to offer a legitimate, nondiscriminatory reason for its action. If the employer articulates such a reason, the Plaintiff must show that the reason given by the employer was pretextual in order to prevail.

*Sullivan v. River Valley School District*, 197 F.3d 804, 810 (6th Cir. 1999), citing §§ 42 U.S.C. 12101 *et seq.*; *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1178, 1184-86 (6th Cir. 1996); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 25, 668 (1973).

**Second:** Respondent Employer, Reuter-Stokes offered a non-discriminatory reason for the discharge and Petitioner failed to show that such reason was a pretext. Even if Gilmore has established a prima facie case, summary judgment remains appropriate because Reuter-Stokes has set forth a nondiscriminatory reason for his discharge. Gilmore was discharged because of a serious customer complaint, unsatisfactory performance and attitude. These are clearly legitimate nondiscriminatory reasons which are sufficient to rebut a prima facie case of discrimination.

Defendant having articulated a non discriminatory reason for its actions, the burden then shifts back to plaintiff to demonstrate that the reasons given are a pretext for discrimination. To rebut the employer's stated non-discriminatory explanation for discharge, the plaintiff must show by a preponderance of the evidence that the proffered reasons (1) have no basis in fact, (2) did not actually motivate the discharge or (3) were insufficient to motivate the discharge. *McCrory v. Kraft Food Ingredients*, 98 F.3d 1342 (6th Cir. 1996).

It is undisputed that the reasons supporting Gilmore's discharge were based on objective observations. As noted, he does not deny that his conduct may have been perceived in the manner that it was described by Reuter-Stokes personnel. They are, therefore, based on fact. There is no evidence that the stated reasons did not actually motivate the discharge. In fact, Gilmore's contention seems to be that because of his disability, they *should* not have motivated the discharge. However, this is not a relevant question, so long as the reasons are *sufficient*. *Ibid.*

There can be no question that any conduct that tends to imperil an employer's relationship with a customer is a sufficient reason for discharge, particular when the employee had been given a specific warning concerning the quality of his communications with customers and the customer's complaint was directly related to communication issues. Significantly, Gilmore offers no facts to dispute that Reuter-Stokes received a serious customer complaint concerning him. Clearly, the related internal communications issues created by Gilmore, his attitudinal problems and their resulting impact on employee morale are sufficient reasons for discharge.

The case of *Wellman v. Wheeling and Lake Erie Railway Co.*, 134 F.3d 373 (6th Cir. 1998), is directly on point. The plaintiff alleged that he suffered from a type of major depression that rendered him disabled for the purposes of the ADA. The district court assumed arguendo that the plaintiff established a prima facie case and looked to the employer's asserted reason for termination. The court found that the business mistakes plaintiff had made in regard to dealings with a customer of the employer were a sufficient, non-discriminatory justification for the employer to fire him and affirmed the district court's grant of summary judgment. The court wrote:

> . . . . . Secondly, even if we assumed that *Wellman* did make out a prima facie case, the district court properly assessed the summary judgment evidence in finding that Wheeling had carried its burden as to the issue of a legitimate nondiscriminatory explanation and that Wellman had failed to respond with any evidence that the asserted reasons were a pretext for a

> discriminatory motive related to his disability. In the absence of any evidence of pretext for a discriminatory motive, the Catsburg Mining transaction and the numerous other incidents of poor decision-making and inefficient work habits provide legitimate non-discriminatory reasons for Wellman's termination and the district court properly granted summary judgment to Wheeling.

134 F.3d at 375.

It does not matter that the reasons were based on conduct which is related to the disability. *Burns v. City of Columbus, Dept. of Public Safety, Div. of Police*, 91 F.3d 836, 841-42 (6th Cir. 1996). In Burns, the court said:

> Unlike Title VII cases, where race or sex will almost never be an acceptable reason for an employment decision adverse to a qualified employee, the Rehabilitation Act permits an employer to make a decision because of a handicap if the handicap is not the sole reason for the decision. "The Rehabilitation Act forbids discrimination based on stereotypes about a handicap, but it does not forbid decisions based on the actual attributes of the handicap. A federal grantee may make an employment decision adverse to a handicapped person if, for example, the person's handicap causes him or her to be unable to perform an essential function of the job."

(Citations omitted.)[1]

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1. The analysis of claims under the Americans with Disabilities Act parallels those brought under the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1995). *Monette*, 90 F.3d at 1178.

*See also Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995)

> [T]he district court correctly focused on the distinction between discharging someone for unacceptable misconduct and discharging someone because of the disability . . . [I]t strains logic to conclude that [unacceptable conduct] could be protected under the Rehabilitation Act or the ADA merely because the actor has been diagnosed as an alcoholic and claims that such action was caused by his disability.

*Jasany v. United States Postal Service*, 755 F.2d 1244, 1250 (6th Cir. 1985); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 n.17, 107 S. Ct. 1123, 1131 n.17, 94 L. Ed. 2d 307 (1987).

*Gray v. Champion Intern. Corp.*, 134 F.3d 371 (6th Cir. 1997) is also instructive. In *Gray*, the district court held that the plaintiff was fired because of his conduct, not because of his disability. The plaintiff, citing the Second Circuit case of *Teahan v. Metro-North Commuter R. Co.*, 951 F.2d 511 (2d Cir. 1991), *cert denied*, 506 U.S. 815 (1992), argued that the district court erred in separating cause from manifestation in this way. He argued, much as Gilmore does, that the company fired him because of his conduct, which occurred because of his disability and, therefore, it fired him because of his disability. Expressly following *Maddox* and rejecting *Teahan*, the court held that the district court was correct in finding that the discharge had a sufficient independent basis. The court further pointed out that a claim that the plaintiff has been discharged because of disability based conduct is a failure to allege pretext and such a plaintiff cannot prevail on an ADA claim.

As stated in the lower court's decision:

> This Court is not permitted to decide whether termination for the concerns raised (i.e., arriving late, leaving early and failing to provide feedback) was fair. *Tobbit & Castlement*, 123 F.3d 899, 898 (6th Cir. 1997) ("An age discrimination action is not a device which permits the jury to examine an employer's reasons for discharge and determine that the employer's business judgment or policies do not appeal to its sensibilities.")

As the lower trial court further stated:

> Plaintiff has not created an issue of fact as to whether Defendant's reason for his termination was pretextual and Counts One (ADA) and Eight (Ohio Revised Code) fail. Count Eight also alleges wrongful discharge in violation of public policy, breach of implied contract and common law discrimination. This portion of the claim fails for the same reasons discussed above.

**Third:** Petitioner never requested an accommodation. He did not inform his employer that he needed an accommodation, due to his alleged disability. Plaintiff alleges that Defendant failed to accommodate him. However, the evidence Plaintiff points to cannot be construed as a request for accommodation.

The initial burden of requesting an accommodation is on the employee. *Gant v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1046 (6th Cir. 1998). For the purposes of a prima facie showing, a Plaintiff must merely suggest the

existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits. *Keys v. Joseph Beth Booksellers, Inc.*, No. 97-6511, 1999 WL 97003 (6th Cir. 1999).

The trial court carefully evaluated the evidence and concluded that the Plaintiff, as a matter of law, had not shown that he was denied a reasonable accommodation and that the evidence did not show that he actually asked for specific accommodation.

**Fourth:** In order to show retaliation, Petitioner must show that he was engaged in protected activity. No such evidence is shown in this case.

In order to show retaliation in a Summary Judgment proceeding, the moving party need only show an absence of evidence to support the nonmoving party's case. *Celotex Corp.*, 477 U.S. at 323. The party in opposition must then set forth specific facts showing that there is a genuine issue for trial and may not rest on his pleadings. *Anderson*, 477 U.S. at 256. Therefore, Defendant has satisfied its burden by pointing to the absence of evidence that Plaintiff engaged in protected activity. Plaintiff's failure to set forth specific facts showing that he did so engage renders summary judgment appropriate in this claim. *Celotex Corp.*, 477 U.S. at 323.

## CONCLUSION

This Court has held in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) that summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. The trial court and the Court of Appeals have both concluded that summary judgment is appropriate under the facts of this case. Plaintiff has failed to show that there is a conflict in the law as it applies to the specific facts of this case.

Plaintiff has failed to show that he requested accommodation and that he was engaged in protected activity. Likewise, Plaintiff has failed to show that the employer's nondiscriminatory reason for discharging him was a pretext.

Based upon the foregoing, the Respondent requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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